

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION NO. 217 OF 1995

For Approval & Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether reporters of local papers may be allowed to see the judgment ?
 2. To be referred to the reporters or not ?
 3. Whether their lordships wish to see the fair copy of the judgment ?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any order made thereunder ?
 5. Whether it is to be circulated to the Civil Judge?

AMBALAL KALIDAS PATEL
VERSUS
NAVNITBHAI HARMANBHAI PATEL & ANR.

Appearance:

MR SM SHAH for Petitioner
MR SB VAKIL for Respondents

Coram: MR.JUSTICE S.K. Keshote,J
Date of decision:30/12/1999

C.A.V. JUDGMENT

#. At the outset I may state that this matter has been argued by both the counsel for the parties as if this Court is sitting as a trial Court or the appellate Court

over the judgment of the trial Court and that too as if this Court has to decide finally whether the suit out of which this revision arises is barred under the provisions of Order 2, Rule 2 of the Civil Procedure Code or not. But the substance of the matter is only where under the impugned order the learned trial Court has declined the prayer of the defendant-petitioner to frame issue of law where the suit out of which this revision application arises is barred by provisions of Order 2, Rule 2 of Civil Procedure code and to decide it as a preliminary issue.

#. The application filed by defendant-petitioner at ex.22 came to be rejected under the impugned order. This application admittedly has been filed by defendant-petitioner before filing by him the written statement in the Civil Suit. It is also not in dispute that before this application came to be decided by the learned trial Court under the impugned order, the defendant-petitioner has filed his written statements in the suit.

#. The learned counsel for the respondent raised a preliminary objection regarding maintainability of this revision application. It is firstly contended that this is not a case decided. The second contention has been raised that the Court has not committed any material irregularity in exercising its jurisdiction in passing of the impugned order. Third contention has been raised that it is not the case where the learned trial Court has declined to frame issue of law, re.: bar of suit under Order 2, Rule 2 of Civil Procedure Code, but only it has declined to frame this issue of law at this stage and to treat it and decide it as preliminary issue. In his submission in case this order is allowed to stand, it will not occasion failure of justice or will not cause any irreparable injury to the petitioner. Fourthly, it is submitted that it is a mixed question of law and fact whether the suit is barred by provisions of Order 2, Rule 2 of Civil Procedure Code. Carrying this contention further, the learned counsel for the respondents submits that in the previous suit very specifically liberty has been reserved by respondents to file suit for specific performance.

#. The learned counsel for the petitioner submits that the suit is barred by provisions of Order 2 Rule 2 of the Civil Procedure code and this issue should have been framed and the Court should have tried it as a preliminary issue. In support of his submission the reference has been made to the provisions of Order 14,

Rule 2 of the Civil Procedure Code. In his submissions, on this issue, if ultimately it is decided in favour of petitioner, the suit has to be dismissed and it is most fit and appropriate case where this issue has to be framed and to be tried as preliminary issue. In support of this contention, he referred to certain decisions also. It has next been contended that it is true that in the previous suit, liberty has been reserved by the plaintiffs-respondents for filing of the suit for specific performance of agreement but this permission has not been granted specifically by the Court nor before filing of this suit, this permission has been taken. So in his submission, if this permission specifically has not been taken, this cause of action is barred by Order 2 Rule 2 of Civil Procedure Code and in support of this contention also, he made reference to certain decisions of the High Courts and Hon'ble Supreme Court. Lastly, it is contended that it is not a mixed question of law and fact but purely a question of law and for decision of the same only two points are to be looked into and examined and the fact whether leave has been granted to file second suit or not. For this, what the learned counsel for the petitioner submits that no oral evidence is required.

#. I have given my thoughtful considerations to the submissions made by learned counsel for the parties.

#. It is not in dispute that this agreement to sell was executed between the parties admittedly on 12.1.91. The petitioner, as earnest money, paid to the plaintiffs-respondents, Rs.5 lacs and on these facts there is no dispute between the parties. It is an admitted fact that the plaintiffs-respondents are in possession of the suit land and rightly so, because the sale consideration of this agreement to sell was Rs.60 lacs. The plaintiffs-respondents filed Regular Civil Suit No.292 of 1992 on 7.7.92 in the Court of Civil Judge (J.D.) at Anand. The plaint of this suit is there in the paper book filed by parties at page 55. The valuation of the said suit is Rs.300/= and this is a suit for injunction. In that suit, in addition to this defendant-petitioner six other persons are impleaded as party. This was a simple suit filed for injunction on the Court fees of Rs.30/-. It is really shocking that for a transaction of Rs.60 lacs, the plaintiff has filed the suit of valuation of Rs.300/- and got a substantial relief. The suit has been filed when the plaintiffs-respondents, having apprehension that the defendants-petitioners may transfer this land to other persons. In para-11 of that suit, it is clearly

mentioned that they are keeping their right reserved for filing of suit for specific performance after following necessary formalities. Translation of Para-11 of the plaint of Regular Civil Suit No.292 of 1992 reads as under:

11. The plaintiffs reserve their right to file a suit for specific performance against defendant No.1 herein, in case the defendants do not execute the sale deed by giving statutory notice to defendant No.1, on the basis of agreement, and it is therefore prayed to grant exemption under Order 2 Rule 2 of the Civil Procedure Code.

#. It is not in dispute between the parties that before filing of the suit, i.e. the present suit being Special Civil Suit No.149 of 1993 in the Court of Civil Judge (S.D.), Anand, permission has not been granted for filing of the same. It is also not in dispute that this permission has not been specifically declined by the Court. This suit has been filed for specific performance of agreement to sell. Much emphasis has been laid by plaintiffs-respondents that these are on two separate and different causes of action the suits have been filed. However, it is not a matter to be considered and decided as whatever observations made may prejudice the case of either of the party in the suit.

#. The learned trial Court has not declined to frame issues on this question of law as, as per the case of the defendant-petitioner and a mixed question of law as per the plaintiffs-respondents. It is true that the learned trial Court has given out that it is a mixed question of law and fact and it has to be decided along with all issues but it has taken all the care to dispose of the suit finally at an early date. The issues have to be framed as what may arise from the pleadings of the parties and on which decision has to be given. The learned counsel for the plaintiffs-respondents is in agreement that this issue may have to be framed by the learned trial Court in the suit. What he says that it is a mixed question of law and fact and it is to be decided along with all issues. After amendment of Civil Procedure Code, all the issues are to be framed and decided together but exception has been carved out as what the learned counsel for the defendant-petitioner is contending, but in the facts of this case, coupled with the fact that liberty has been reserved by the plaintiffs-respondents for filing of the suit for specific performance by filing first suit and which has not been declined by the Court, the approach of the

learned trial Court cannot be said to be perverse. It is not the strict rule that in the case where plea of bar of suit under any provisions, in all the cases, issue is to be framed deferring framing of all other issues and to be decided as a preliminary issue. It is ultimately the discretion of the learned trial Court and in the facts of this case, I do not find any error in the approach of the Court below. It is only a deferment of framing and decision on this issue and not where the Court has said that this issue will not be framed. It is difficult to appreciate this haste in which this revision application has been filed by defendant-petitioner before this Court. The Court has taken care of the facts of this case and given priority to the suit in hearing but instead of waiting for few months, the defendant-petitioner has chosen to file this civil revision application whereby he stalled the proceedings of the suit for all these years. It is understandable the petitioner being defendant in the suit he may make all efforts to stall the proceedings of the suit but if we go by the substance of the matter, it is a case where on this application of the defendant-petitioner, the learned trial Court has only decided that it is not the stage where this issue has to be framed and to be decided as a preliminary issue. By this order, in fact, no rights of the parties have been decided. It is only an interlocutory order which otherwise does not decide any of the right of either of the parties in the litigation and I am in agreement with the learned counsel for the plaintiffs-respondents that it may not fall in the category of case decided. Otherwise also it cannot be said to be a case which falls under any of the category of clauses (a), (b) or (c) of sub-section 1 of Section 115 of the Civil Procedure Code. It is not the case of learned counsel for the petitioner also that this case falls under clauses (a), (b) of sub-section 1 of Section 115 of the Civil Procedure Code. At the most, it may be contended that it may fall under clause (c) of sub-section 1 of Section 115 of the Civil Procedure Code. In the case of M/s D.L.F. Housing and Construction (P) Ltd. v. Sarup Singh and ors., reported in AIR 1971 SC 2324, their Lordships, Supreme Court held that, "the position thus seems to be firmly established that while exercising jurisdiction under Section 115 it is not competent to the High Court to correct errors of fact however gross or even errors of law unless such errors have relation to the jurisdiction of the Court to try the dispute itself". Before the Hon'ble Supreme Court, the matter was with regard to stay of the proceedings under Section 30 of the Land Acquisition Act. Reference proceedings were stayed pending the suit filed for specific performance. In this factual background,

the Court said further that "clauses (a), (b) of this section on their plain reading quite clearly do not cover the present case", what precisely it is also there in this case. It was no the contention before the Hon'ble Supreme Court in that case nor before this Court in this case of the learned counsel for the petitioner that the learned trial Court had either exercised the jurisdiction not vested in it by law or it failed to exercise jurisdiction so vested in it in passing of the impugned order. Clause (c), as what the Hon'ble Supreme Court said in that case, is also not applicable in this case. The Hon'ble Supreme Court observed, "the words "illegality" and "with material irregularity" as used in this clause do not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may, in our view, relate either to breach of some provisions of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with. The High Court does not seem to have adverted to the limitation imposed on its power under S.115 of the Code. Merely because the High Court would have felt inclined, had it dealt with the matter initially, to come to a different conclusion on the question of continuing stay of the reference proceedings pending decision of the appeal, could hardly justify interference on revision under S.115 of the Code when there was no illegality or material irregularity committed by the learned Addl. District Judge in his manner of dealing with this question. It seems to us that in this matter the High Court treated the revision virtually as if it was an appeal".(Emphasis provided).

#. Here also, in the present case, under the impugned order, what the learned trial Court did is to defer to frame the issue that the present suit is barred by provisions of Order 2, Rule 2 of Civil Procedure code. How this decision of the learned trial Court can be termed or put in the category where it has said to have committed illegality or material irregularity in exercise of jurisdiction in passing the impugned order. It is not a case where what it is contended by learned counsel for the petitioner that the error committed by the Court below will lead either to breach of some provision of law or some material defect or procedure affecting the ultimate decision. The learned trial Court has not decided that it will not frame the issue under Order 2, Rule 2 of Civil Procedure Code. At the cost of repetition, it is to be stated that it has only deferred

framing of issue and to try it as preliminary issue. Otherwise also, if this order is allowed to stand, I fail to see how it will occasion failure of justice or will cause any irreparable injury to the petitioner. This issue will be framed at an appropriate time and the Court will decide the same and if ultimately the petitioner succeeds in establishing that the suit is barred by provisions of Order 2, Rule 2 of the Code, the suit can be decided accordingly.

##. This civil revision application otherwise is clearly barred under the proviso (b) to sub-section 1 of Section 115 of the Civil Procedure Code and no interference can be made by this Court with the impugned order. In view of this fact, otherwise also, no interference has to be made by this Court with the impugned order. Reference, if any, necessarily may have to the decision of the of the apex Court in the case of Mahavir Prasad Singh v. Jacks Aviation Pvt. Ltd., reported in 1999(1) SCC 37.

##. As a result of the aforesaid discussion, this civil revision application fails and the same is dismissed. Rule discharged. Interim relief earlier granted by this Court stands vacated. No order as to costs. The learned trial Court is directed to decide the suit, as what it was earlier directed by it, within a period of six months from the date of receipt of writ of this order.

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[sunil]